IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.107 OF 2006
IN
NOTICE OF MOTION NO.108 OF 2005
IN
PETITION NO.199 OF 2004

Ramavatar Kunjilal Gupta
& Anr. ..Appellants.

Vs.

SICOM Ltd. ..Respondent.

Mr.Mahendra Shah, Sr.Counsel with Mr.N.C.Parekh, Ms.Manisha Poladia and Ms.Diksha Dadmal i/by M/s.Mansukhlal Hiralal & Co. for the Appellants.

Mr.Kishor Jain with Mr.P.V.Shah for the Respondent.

CORAM: DR.S.RADHAKRISHNAN &
S.J.VAZIFDAR, JJ.

DATE : 26TH APRIL, 2006.

ORAL JUDGMENT : (Per S.J. Vazifdar, J.)

By consent, the appeal is admitted and heard finally.

2. This is an appeal against the order and judgment of the learned Single Judge dismissing the above Notice of Motion taken out by the Appellant seeking to set aside an ex-parte order dated 21st June, 2005. By the order dated 21st June, 2005 another learned Judge allowed the above petition filed by the Respondent for adjudicating the Appellant insolvent.

3. The learned Judge rejected the Appellant's contention and held that they had been duly served. It appears from the impugned judgment that the parties also addressed the learned Single Judge on merits of the main matter. Before us the only contention raised to set aside the impugned order was that the order dated 21st June, 2005 was unsustainable in law being contrary to the provisions of Section 3 of the Limitation Act, 1963. We will therefore confine our order to this question alone.

4. The Respondent is the decree holder. The Respondent's Summary Suit No.3646 of 1987 was decreed against the Appellant as the guarantor in respect of the dues of Trimbak Ispat Pvt.Ltd. The decretal amount with interest as on 30th June, 1989 was Rs.38,04,080.50.

5. On 3.9.2002 the Respondent filed Execution Application No.386 of 2003. On 10th October, 2003 Notice No.1456 of 2003 was taken out under Order 21 Rule 22 of the Code of Civil Procedure, 1908 by the Respondent. By an order dated 2.12.2003 the Notice under Order 21 Rule 22 was made absolute.

6. On 21st February, 2004 the Respondent took out Insolvency Notice N/24 against the Appellants and the Respondent No.2. On 19th April, 2004 the Appellant took out Notice of Motion No.82 of 2004 for setting aside the said notice.

7. By an order dated 23.12.2004 F.I.Rebello, J. dismissed the said Notice of Motion. It is pertinent to note that in paragraph 3(iii) the learned Judge expressly stated that one of the questions before him was whether the decree is incapable of being executed on the ground that it was barred by limitation. Negating this contention, the learned Judge held as under:-

> "The issue of limitation is a mixed question of fact and law. Issue of executability of decree as barred by limitation can be decided on the record as it stands and not by this Court enquiring or investigating into facts. The Executing Court could have gone into that issue. In the instant case Respondent, as is noticed, had raised no objection of that kind and even if raised, liberty having been granted to execute the decree, the objection as to limitation must have been deemed to be rejected and to my mind it would not be possible for the first tune especially after the executing Court has granted leave to the judgment creditors to execute the decree to permit the debtors to now raise the contention that the decree

> cannot be executed as it is sought to be executed beyond the period prescribed by law of limitation. That contention must be rejected."

8. On 24.12.2004 Respondent No.1 filed the above Insolvency Petition against the Appellants.

9. On 5th February, 2005 the Appellants filed Appeal No.200 of 2005 against the order of F.I.Rebello J. dated 23rd March, 2004. The Appeal was dismissed by an order dated 29th March, 2005 by the Division Bench, to which one of us (S.J.Vazifdar, J.) was a party.

10. It is important to note that both the parties argued the point before the Division Bench as to whether by virtue of the order dated 2nd December, 2003 making the notice under Order 21 Rule 22 of the Code of Civil Procedure, 1908 absolute, the question as to limitation was res-judicata. The Division Bench dealt in detail with the submissions. Relying upon various judgments the Division Bench expressly held that the objection as to limitation was clearly barred by the principles of constructive res-judicata. This judgment has not been challenged.

11. Thus, Notice of Motion No.82 of 2004 taken out by the Appellants to set aside the Insolvency Notice N/24 of 2004 stood finally dismissed. We are informed that the order of the Division Bench dated 29th March, 2005 has not been challenged.

12. In the meantime, on 24.12.2004 Respondent No.1 filed the above Insolvency Petition No.199 of 2005 which was made absolute by the order dated 21st June, 2005. The above Notice of Motion being Notice of Motion No.108 of 2005 was taken out by the Appellants on 4th July, 2005 for setting aside the order dated 21st June, 2005. By the impugned order the Notice of Motion was dismissed.

13. Mr.Shah, the learned Senior Counsel appearing on behalf of the Appellants submitted that we are not bound by the judgment of the Division Bench dated 29th March, 2005. According to him, the judgment dated 29th March, 2005 is wrong in law and has been incorrectly decided. Mr.Shah submitted that though the doctrine of precedent would normally apply disentitling a Court of co-ordinate jurisdiction to take a different view, the rule would not apply in insolvency proceedings. He based the submissions on the ground that the consequences of a person being

declared an insolvent are drastic.

14. We are unable to agree with this submission. Even assuming that the judgment of the Division Bench is incorrect and wrongly decided, we are bound by the same. We see no justification or reason to hold that the doctrine of precedent does not apply to insolvency matters. Mr.Shah has not invited our attention to any provisions of law or precedent in this regard either. Merely because the consequences of orders and judgments are drastic would not negate the doctrine of precedent. We know of no rule of law or precedent to support this contention.

15. Mr.Shah then submitted that the order dated 2.12.2003 making the notice under Order 21 Rule 22 absolute, was a nullity as the notice was barred by limitation. Consequently according to him all subsequent orders and judgments in this matter are a nullity and the Appellants would be entitled to challenge the same in every new and fresh application and proceedings. Mr.Shah submitted that the provisions of the statute viz. the Limitation Act are above the judgments of a Court. He submitted that the order making the notice under Order 21 Rule 22 absolute, being contrary to law, all the

subsequent judgments of this Court would be a nullity.

16. In *Tribhovandas Purshottamdas Thakkar v. Ratilal Motilal Patel & Ors., AIR 1968 Supreme Court, 372*, a similar question fell for consideration. A learned Single Judge of the High Court observed that even if there is a judgment of the Single Judge of a High Court, of which he is a member, or of a Division Bench of that High Court, he is not bound to follow that precedent, because by following the precedent, the Judge would act contrary to section 165 of the Indian Evidence Act, and would also violate the oath of office taken by him when entering upon his duties as a Judge under the Constitution.

The Supreme Court, in paragraphs 8 to 13 rejected the view as subverting the accepted notions about the force of precedents in our system of judicial administration and held that, if the view is accepted, the law should be thrown into a state of uncertainty by reason of conflicting decisions. The Supreme Court held that there was nothing in the oath of office which warrants a Judge in ignoring the rule relating to the binding nature of precedents, which is uniformly followed.

17. Mr.Shah's reliance upon the Full Bench judgment of this Court in the case of **Abdullamiyan Abdulrehman V/s.The Government of Bombay (1992 B.L.R.577),** and the judgment of the Supreme Court in the case of **Chiranjilal Shrilal Goenka V/s. Jasjit Singh & Others - (1993) 2 Supreme Court Cases 507,** is also unfounded. He relied upon the judgment in support of the submission that a decree without jurisdiction is a nullity and can be ignored.

18. We are unable to agree. The orders and judgments have not been passed without jurisdiction. The Court had jurisdiction to decide the issue before it. If the interpretation of the law was incorrect, the only remedy of the party was to challenge the orders in Appeal. The contention that the orders are a nullity is rejected.

19. The judgment of the Division Bench of this Court in the case of **the Maharashtra State road Transport Corporation V/s.Raoji Hari Lad, reported in AIR 1977 Bombay 1,** does not support the Appellant's case. The Division Bench held that no Court is entitled to invoke any principle for holding the claim as not barred by the law of limitation if such a principle

is not to be found in the provisions of the Limitation Act. The Division Bench held that no separate or independent principle can be invoked to add to or supplement, much less abrogate or nullify the provisions of the Limitation Act.

We do not read the judgment as having held that if provisions of the Limitation Act have been construed in the judgment a Court of co-ordinate jurisdiction would not be bound by it, if it disagreed with the judgment.

20. The suggestion that because Section 3 of the Limitation Act is based on a rule of public policy the doctrine of precedent would not apply, is unfounded.

21. Mr.Shah’s reliance upon the judgment of the Supreme Court in the case of **Badri Prasad and Others V/s Nagarmal and Others reported in AIR 1959 SC 559,** is equally without force. It was held that no Court can exclude from its consideration provisions of a public statute. Relying upon this proposition, Mr.Shah submitted that it was not open to this Court to ignore the provisions of Section 3 of the Limitation Act. In this Appeal, we are not ignoring

the provisions of Section 3 of the Limitation Act. Nor have the earlier judgments ignored the same.

A Division Bench of this Court held that the principles of constructive res-judicata apply to a case such as the one before us. The question is whether we are entitled to ignore this judgment of the Division Bench which is otherwise binding on us. The Supreme Court has not even suggested the same. Before the Supreme Court it was contended that the Respondents should not be allowed to raise the objection based on the statute at such a late stage. The Supreme Court rejected this contention on the ground that the objection, though taken at the late stage, based on the provisions of a public statute and based on a question of law, which did not require the investigation of any facts. In the case before the Supreme Court, the question of the doctrine of precedent, did not even arise.

22. The question before us did not fall for the consideration of a learned Single Judge of this Court in the case of **Vijay Jethalal Shah V/s.Laja Nandlal Raheja and Another reported in AIR 1980 Bombay 76.** It was held that the heirs of the judgment-creditor cannot execute the decree without obtaining

representation to the estate of the deceased judgment-creditor in view of Section 214 of the Indian Succession Act. There can be no dispute on the general proposition that the Court cannot act contrary to law. In fact, if we were to ignore the Division Bench Judgment, we would be acting contrary to the established norms of judicial discipline.

23. Mr.Shah relied upon the judgment in **Jang Singh V/s.Brij Lal and Others, AIR 1966 SC 1631,** where the Supreme Court recognised the doctrine expressed in the maxim **"actus curiae neminem gravabit"**, to contend that if the judgment is wrong it ceases to have binding effect as a precedent. We are entirely unable to agree. The said maxim does not by any stretch of imagination dilute the effect of a judgment of a Court of record as a precedent. It operates in an altogether different manner. The Supreme Court was concerned with a matter which arose out of the execution of a decree for pre-emption passed in favour of the Appellant. By the order under appeal, the High Court had held that the Appellant had not deposited the full amount as directed by the decree within the time allowed to him and therefore dismissed his suit for pre-emption. The Appellant had in fact approached the Court with

an application to make the deposit ordered by the Court. The Court and the clerk made a mistake by ordering him to deposit an amount which was less by one rupee. It was in these circumstances that the appellant deposited the amount less by one rupee. The Supreme Court held that the mistake had been committed by the Court and therefore must be set right. It is inter-alia this kind of mistake of the Court that can be set right on the basis of the principle "actus curiae neminem gravabit". The principle does not ignore or even dilute the force of judicial precedent.

24. The decree in the present case admittedly was not a nullity. The Division Bench has already held that the objection as to limitation is barred by the principles of constructive res-judicata. That was a judgment in a matter which the Division Bench had jurisdiction to entertain and decide. That the Division Bench may have decided the same rightly or wrongly is another matter.

25. In the circumstances, Appeal is dismissed. The Appellant shall pay to the Respondents the costs of this Appeal fixed at Rs.5000/- within ten weeks from today.

(DR.S.RADHAKRISHNAN,J.)

(S.J.VAZIFDAR, J.)